

BRB No. 04-0326

BELINDA DANOS	)	
(Widow of DEAN DANOS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TWO R DRILLING COMPANY	)	DATE ISSUED: 11/30/2004
	)	
and	)	
	)	
EMPLOYERS INSURANCE COMPANY	)	
OF WAUSAU	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Frischhertz & Associates, L.L.C.), New Orleans, Louisiana, for claimant.

Kevin R. Tully and H. Carter Marshall (Christovich & Kearney, LLP), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-LHC-0283) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's husband (the decedent) performed various jobs for employer from the date of his employment in 1975 until he suffered a work-related back injury on March 19, 1982. Following surgery on January 21, 1983, the decedent was released to restricted work but did not return to his former position because it had been eliminated; the decedent did not work from the date of injury until he died on September 28, 2001, due to cardiomegaly with biventricular dilation. JX 8.

Administrative Law Judge Kerr awarded the decedent benefits for temporary total disability in his Decision and Order dated July 20, 1984. Judge Kerr modified this award on August 25, 1986, to one for permanent total disability, finding the decedent reached maximum medical improvement on April 8, 1985. Following the decedent's death in September 2001, claimant sought death benefits and funeral expenses, 33 U.S.C. §909, alleging the decedent's work injury caused his increasing inactivity and consumption of food, resulting in weight gain, and the development of diabetes, hypertension, and abnormal cholesterol, all of which contributed to the decedent's fatal heart attack brought on by enlarged and thickened heart muscle.

In his Decision and Order, Administrative Law Judge Kennington (the administrative law judge) concluded that claimant failed to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), linking the decedent's death to his employment injury, and that even if the presumption were invoked, it was rebutted. The administrative law judge stated that this rebuttal evidence was more persuasive and accordingly found that decedent's death was not work-related.

Claimant appeals, arguing that the administrative law judge erred in finding that the Section 20(a) presumption is not invoked and, alternatively, in finding that even if the presumption were invoked, employer established rebuttal of the presumption. Claimant also contends the administrative law judge should have credited the opinion of Dr. Laborde that decedent's death was work-related. Employer responds, urging affirmance of the denial of benefits.

Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors "if the injury causes death." In establishing entitlement to benefits, claimant is aided by Section 20(a) which presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See, e.g., American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir. 1998). In addressing the scope of Section 9 where the immediate cause of death is not work-related, the Board has applied the maxim that "to hasten death is to cause it." *See Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993);

*Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982)(Ramsey, C.J., dissenting); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4<sup>th</sup> Cir. 1992).

Claimant initially contends that the administrative law judge erred in not finding she was entitled to invocation of the Section 20(a) presumption. We need not address this contention because, assuming, *arguendo*, that the presumption was invoked,<sup>1</sup> the administrative law judge found it was rebutted.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that decedent's death was not caused or contributed to by his employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 124 S.Ct. 825 (2003); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT). The administrative law judge found that employer established rebuttal of the Section 20(a) presumption based upon the opinion of Dr. Lavie, a board-certified internist and cardiologist, who is Director of the Exercise Laboratories and Medical Director of the Cardiac Rehabilitation and Exercise Training Program at the Ochsner Clinic, that the decedent's back injury did not contribute to his death. Decision and Order at 17. Claimant contends that Dr. Lavie's opinion is insufficient to establish rebuttal because he conceded that long-term obesity can result in cardiac conditions such as the decedent's.

Dr. Lavie testified that while the decedent's fatal cardiac event was the result of his long-term obesity, diabetes and hypertension, these conditions were not related to the decedent's back condition.<sup>2</sup> HT at 140; EX 1 at 22. While Dr. Lavie did allow that an individual with a back injury could possibly have mobility problems which in turn could pay a role in weight gain, it was his opinion that the decedent's obesity did not arise out of his work injury. Dr. Lavie stated that, to a reasonable degree of medical certainty,

---

<sup>1</sup> The administrative law judge found that the Section 20(a) presumption was not invoked because Dr. Laborde failed to establish a correlation between the back injury and decedent's obesity. Dr. Laborde's testimony that the decedent's back injury resulted in his inactivity and obesity, and in turn, diabetes and high blood pressure which contributed to his death, was contradicted by his medical records repeatedly counseling the decedent to diet and increase his level of activity. The administrative law judge concluded that if the decedent could and should have been exercising as recommended by his treating physician, then the explanation for the decedent's obesity was a personal choice not to diet or exercise, not his back injury. Decision and Order at 16.

<sup>2</sup> It was also Dr. Lavie's opinion that the decedent's back condition did not prevent physical activity and healthful exercise, which was recommended by the decedent's treating physicians, Drs. Soboloff, Laborde and Hannie. EX 1 at 24.

decedent's death was not directly or indirectly caused by the work injury. EX 1 at 21, 22, 26. Dr. Lavie noted the decedent's history of smoking, and his family history of obesity, hypertension and diabetes as cardiovascular risk factors. Further, he noted not only the decedent's history of successful weight loss throughout the relevant period of time but also that the decedent's treating physicians stated that he was capable of exercise and repeatedly recommended it.<sup>3</sup> Thus, it was Dr. Lavie's opinion that the decedent's weight gain was the result of his continued high caloric intake and low exercise levels, and that decedent's heart condition was not the result of his back injury or its sequelae. Although claimant disputes the weight the administrative law judge gave to Dr. Lavie's opinion, it is sufficient to establish rebuttal of the Section 20(a) presumption. *Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT). Accordingly, the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption is affirmed.

Once the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Claimant argues that the administrative law judge erred in relying upon the opinion of Dr. Lavie over that of Dr. Laborde in finding that the evidence as a whole does not establish the work-relatedness of decedent's death. Decision and Order at 17.

It is within the administrative law judge's discretionary powers to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge relied on the opinion of Dr. Lavie which he found supported by the evidence of record including medical opinions that the decedent could and should exercise, a family medical history which included familial obesity, hypertension and heart disease, and the decedent's smoking history. Dr. Laborde, an orthopedist upon whom claimant relies, testified that the decedent's inability to exercise as a result of his back injury caused weight gain, which in turn lead to the development of diabetes and high blood pressure which contributed to decedent's death..

---

<sup>3</sup> The record reflects that the decedent, who was 5 feet 6 inches tall and 165 pounds at the time of his injury, gained 60 to 70 pounds, lost most of that weight in 1986, went up to 305 pounds and lost 100 pounds in 1992 and was approximately 230 pounds at the time of his death. HT at 108-111; 117-118.

JX 5 at 1. However, the administrative law judge found that Dr. Laborde was unaware of the significant factors in the decedent's personal and family medical history, which Dr. Lavie discussed, and Dr. Laborde treated the decedent only for his back problems. The administrative law judge also found claimant's testimony unpersuasive as it contained inaccuracies and contradictions regarding the decedent's medical, weight, and smoking histories as well as that of his family members. Decision and Order at 15.

We affirm the administrative law judge's decision as it is supported by substantial evidence. The administrative law judge discussed all relevant evidence and provided rational reasons for choosing from among competing medical opinions. It is the administrative law judge's prerogative to weigh the evidence and to make credibility assessments, and we decline to disturb his judgment as the findings are adequately anchored in the record. *See Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4<sup>th</sup> Cir. 1994). The administrative law judge did not abuse his discretion in giving little weight to claimant's testimony or to the opinion of Dr. Laborde. The administrative law judge's reliance upon the opinion of Dr. Lavie based on his greater understanding of decedent's medical history is rational. Thus, as it is rational, supported by substantial evidence and in accordance of law, we affirm the administrative law judge's denial of death benefits and funeral expenses. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge